IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10110 of 2006
With
SPECIAL CIVIL APPLICATION No. 25997 of 2006
With
CIVIL APPLICATION No. 251 of 2007
With
SPECIAL CIVIL APPLICATION No. 1039 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAYANTIBHAI DAHYABHAI PATEL - Petitioner(s)
Versus
STATE OF GUJARAT & 7 - Respondent(s)

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Appearance :

SCA No. 10110 of 2006.

MR HARIN P RAVAL for Petitioner(s) : 1.
MR.SHIRISH JOSHI FOR MR.BAIJU JOSHI for Respondent No.5.
MR. MIHIR JOSHI, ADDL. ADVOCATE GENERAL WITH MS. ARCHANA RAWAL. AGP. for Respondent(s) : 1 to 4.
DS AFF.NOT FILED (N) for Respondent(s) : 1 - 5,5.2.1 - 6,6.2.1 - 7, 7.2.1,7.2.2 – 8,8.2.1

SCA No. 25997 of 2006.
MR. HARIN P.RAVAL for petitioners.
MR.MIHIR JOSHI, ADDL. ADVOCATE GENERAL WITH
MS. ARCHANA RAWAL, AGP. for Respondent Nos. 1 to 5.
MR.SHIRISH JOSHI WITH MR.BAIJU JOSHI for Respondent No.6.

C.A.No. 251 of 2007 In SCA No.25997 of 2006.
MR HARIN P.RAVAL for Applicant.
MR MIHIR H.JOSHI, ADDL. ADVOCATE GENERAL WITH
MS. ARCHANA RAWAL, AGP. for Respondent Nos. 1 to 5.
MR.SHIRISH JOSHI with MR.BAIJU JOSHI for Respondent No.6.

SCA No. 1039 of 2007.
MR N.D. NANAVATI FOR MR ASHISH H SHAH for Petitioner(s) : 1,
MR MIHIR H.JOSHI, ADDL. ADVOCATE GENERAL WITH MR.UMANG OZA, AGP. for Respondent(s) : 1 to 5.
None for Respondent(s) : 2 - 7.

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 05/02/2007

ORAL JUDGMENT

1 Both the petitions, Special Civil Application No. 10110 of 2006 and Special Civil Application No. 25997 of 2006, arise out of common issue, viz.,whether the petitioner (who is also common in both the petitions) can be held to be liable under the provisions of Section 93 of the Gujarat Cooperative Societies Act, 1961. As the facts in both the petitions overlap and are common, the learned Advocates appearing for the respective parties have addressed the Court in relation to both the petitions simultaneously and the petitions are therefore heard together and are being disposed of by this common judgment. The third petition, Special Civil Application No. 1039 of 2007, is consequential to the earlier two petitions, as accepted by the learned Counsel.

2 It is the say of the petitioner that : *"The petitioner is a social worker and leader in the cooperative sector since three decades. The petitioner is director in respondent no.5 Union as well as director in respondent no.7 Federation. The petitioner also is Chairman in respondent no.6 Union."* In Special Civil Application No.10110 of 2006 order dated 21.3.2006 made by the Gujarat State Cooperative Tribunal (the Tribunal) in Appeal Nos. 356 and 647 of 2002 has been challenged. In Special Civil Application No. 25997 of 2006 order dated 29.11.2006 made by the Tribunal in Appeal No. 535 of 2002 has been challenged. However, admittedly all the Appeals arise out of common order dated 17.9.2001 made by the Inquiry Officer appointed by the Registrar under Section 93 of the Act in the following circumstances :

3 The petitioner and six other Directors of the Managing Committee of Kheda District Cooperative Union (the Union) undertook a tour to New Delhi at the invitation of National Centre for Cooperative Education. A special audit was conducted at the behest of the Registrar because of which certain facts came to light. Hence, on 19.6.2001 one Shri Trilochan M.Dave was appointed as an Inquiry Officer. The Inquiry Officer issued a show cause notice to the petitioner as well as other persons in relation to the following issues :

(1) Donation of a sum of Rs.1,51,000/- under resolution No.10 dated 1.10.1997;
(2) Member Directors of the Managing Committee were to participate in the Leadership Development Programme

between 22.4.1998 to 24.4.1998 and hence, considering the days required for travelling to and fro, against programme of total number of 8 days the Directors travelled for 16 days along with their family members and incurred expenses of Rs.73,500/- paid to Patel Travels, thus incurring additional expenses of Rs.50,531.25 ps. which was recoverable from the responsible officers;

(3) Permitting leave encashment to one Shri Manubhai M.Patel, Executive Officer, thus causing loss to the extent of Rs.94,736/- to the Union.

3.1 After considering the replies and the evidence brought on record the Inquiry Officer came to the conclusion that the charges relating to issue Nos. 1 & 3 were not proved and hence, the petitioner and the others were exonerated of the same, while at the same time the Inquiry Officer came to the conclusion that each one of the 10 committee members/directors was liable to pay a sum of Rs.5112.80 ps. being expenditure incurred beyond the sanctioned expenditure vide resolution No.10 dated 31.3.1998. This order was made on 17.9.2001.

3.2 It is an admitted fact that on 31.3.1998 the Managing Committee comprised of following ten persons passed resolution No.10 whereunder it was decided that all the members/directors of the Managing Committee should be sent as delegates to attend the Leadership Development Programme which was to be conducted by the National Cooperative Union of India, New Delhi :

(1)Shri Umedsinh Fatesinh Gohel.

(2)Shri Chaturbhai Naranbhai Patel.

(3)Shri Parvatsinh Chaturbhai Chauhan.

(4)Shri Harikrushna Bhagwandas Chauhan.

(5)Shri Vijaykumar Fulabhai Patel.

(6)Shri Jayantibhai Dahyabhai Patel.

(7)Shri Manibhai Bhailalbhai Patel.

(8)Shri Sureshbhai Ramjibhai Patel.

(9)Shri Mahendrabhai Bhanubhai Patel.

(10)Shri L.P.Parmar.

3.3 The Inquiry Officer having held each one of the said ten persons responsible u/s. 93 of the Act, Shri L.P.Parmar and Shri Sureshbhai Ramjibhai Patel preferred appeals being Appeal No. 356 of 2002 and Appeal No. 647 of 2002 respectively, before the Tribunal. Vide order dated 21.3.2006 the Tribunal while allowing the appeals preferred by the said two committee members modified the personal liability qua each director and held that only the following 7 persons were liable to recompense the Union by a sum of Rs.5,477.70 ps. with interest @ 12% on and from 1.4.1999 till the date of recovery.

"1 Shri Umedsinh Fatesinh Gohil.

2 Chaturbhai Naranbhai Patel.

3 Parvatsinh Chaturbhai Patel.

4 Harikrushnabhai Bhagwandas Patel.

5 Vijaykumar Fulabhai Patel.

6 Jayantibhai Dahyabhai Patel.

7 Manibhai B. Patel".

This order has been challenged by the petitioner principally on the ground of lack of opportunity as the petitioner was not an appellant or a party in the aforesaid two appeals before the Tribunal.

3.4 One Shri Vijaybhai Fulabhai Patel, Shri Harikrishna Bhagwatbhai Patel and Shri Chaturbhai Naranbhai Patel along with the petitioner preferred appeal being Appeal No. 535 of 2002 before the Tribunal challenging order dated 17.9.2001 made by the Inquiry Officer. On 28.6.2002 at the time of admission of the appeal an exparte stay came to be granted in favour of the petitioner and three other appellants which continued from time to time. After hearing the learned Advocate for the appellants the appeal came to be dismissed by the Tribunal vide order dated 29.11.2006 against which Special Civil Application No. 25997 of 2006 has been preferred only by one of the four appellants i.e. the petitioner. The principal ground of challenge is that in the second order made by the Tribunal, the Tribunal has recorded incorrect facts and thus has proceeded on an incorrect basis.

4 At the time of hearing of the petitions the learned Counsel appearing on behalf of the petitioner has challenged both the orders of the Tribunal on the following grounds :

(a) The Tribunal had not granted the petitioner an opportunity of hearing while passing the earlier order in Appeal Nos. 356/02 and 647/02 as the petitioner was not a party therein.

(b) The subsequent order made by the Tribunal, wherein the petitioner was an appellant proceeds on an incorrect factual basis and is thus vitiated.

(c) That on merits the basis adopted by the Inquiry Officer and confirmed by the Tribunal is incorrect because only a sum of Rs.73,500/- had been paid to Patel Travels for the entire trip and no further or other expenses had been incurred so as to fasten any liability on the petitioner.

(d) That the onus to show that any expenditure beyond the expenditure incurred as supported by the resolution was on the authority and the authority had failed to discharge the said onus.

(e) That an appeal was a continuation of the original proceedings and in the circumstances the Tribunal ought to have called upon the petitioner and granted opportunity to present his case.

4.1 An incidental submission was to the effect that the Tribunal was aware or ought to have been aware that an appeal preferred by three others and the petitioner was pending and hence, the Tribunal could not have heard the appeals filed by Shri L.P. Parmar and Shri Sureshbhai Ramjibhai Patel without consolidating all the three appeals. For this purpose, it was strenuously urged that the Tribunal was aware, and such awareness to the Tribunal must be presumed, because the earlier order dated 31.3.2006 made by the Tribunal had already been challenged by the petitioner before this

Court in Special Civil Application No. 10110 of 2006 and vide order dated 9.5.2006 this Court had granted ad interim relief in terms of paragraph No. 34(F) of the said petition. That writ of the said order had duly been served on the Tribunal. Therefore, the Tribunal could not have passed any order in the Appeal preferred by the petitioner and three others by placing reliance on the earlier order dated 21.3.2006

4.2. Inviting attention to provisions of Section 93 of the Act, it was submitted that none of the defaults mentioned in the said Section were shown to have been committed by the petitioner and therefore once the provision itself was not applicable the entire inquiry was bad in law and the Tribunal could not have confirmed the order of the Inquiry Officer. That in fact the proceedings were in the nature of quasi-judicial criminal proceedings and the onus was not discharged, there being no inquiry as to whether any more expenses, viz., more than the sanctioned expenditure, were actually incurred; that in absence of such inquiry and finding based on evidence no default could have been ascribed to the petitioner.

4.3 Elaborating on the submissions it was contended that the Tribunal had incorrectly recorded in order dated 29.11.2006 in Appeal No. 535 of 2002, that the Appellants had not appeared before the Inquiry Officer or had not given any reply to the charges framed against them. Whereas, in fact the petitioner and the other appellants had categorically filed their reply and the same had duly been considered by the Inquiry Officer as was apparent from

the order of the Inquiry Officer. That the petitioner in his reply filed before the Inquiry Officer had categorically contended that the sum of Rs.73,500/-, which was the sanctioned sum, had been paid to Patel Travels and was only for the purpose of trip from Nadiad to Delhi and back; that such expenses did not include any expenditure relatable to the family members or the travel for additional days and therefore there was no question of effecting any recovery from the petitioner.

5. The learned Addl. Advocate General appearing on behalf of the respondent authorities submitted that in so far as the writ petitions are concerned, in the first instance, as laid down by the Apex Court in the case of *Nagendra Nath Bora And Anr. Vs. Commissioner of Hills Division, AIR 1958 SC 398,* with special reference to paragraph Nos. 24 and 25, as well as in the case of *Surya Dev Rai Vs. Ram Chander Rai and others, (2003) 6 SCC 675,* with special reference to paragraph Nos. 38.3, 38.4 and 38.5, the petitioner was seeking a writ of certiorari which could be granted only in the event of failure of justice and not merely because there was some error in the impugned order of the subordinate Forum. Responding to the contention that the Tribunal had incorrectly recorded the facts and failed to deal with the issue of onus it was submitted that the said ground was irrelevant for deciding the validity of the order of the Tribunal because firstly, the said issue had been raised before the Inquiry Officer who had already dealt with the same; secondly no ground of challenge had been raised in the memorandum of appeal filed before the Tribunal or before the High Court in the writ petition. That the Tribunal was only

required to look into the correctness and legality of the order /report made by the Inquiry Officer and was not required to enter into reappreciation of evidence unless and until an appellant before the Tribunal specifically invited attention of the Tribunal to the order of the Inquiry Officer and the evidence on record to contend that a particular piece of evidence had not been considered by the Inquiry Officer. That this was not so in the present case. He therefore, urged that the petition did not merit acceptance and was required to be rejected on this solitary ground.

6. Mr. Shirish J.Joshi, learned Advocate appearing on behalf of the respondent Cooperative Union supported the order made by the Tribunal and submitted that at no point of time the petitioner had shown that order dated 9.5.2006 made by the High Court had been produced by the petitioner before the Tribunal in pending appeal No. 535 of 2002 so as to prevent the Tribunal from referring to its earlier order dated 21.3.2006. It was submitted that the petitioner had not produced any evidence before the Inquiry Officer that any additional sum relating to the family members and additional days of tour had been borne by the petitioner out of his pocket and therefore, the said ground cannot be considered by this Court at this stage.

7. In rejoinder, the learned Advocate for the petitioner vehemently contended that once the writ of the Court was available on record of the Tribunal, the Tribunal could not have proceeded to pass order dated 29.11.2006 by referring to and relying upon its earlier order dated 21.3.2006. According to the

learned Advocate, the Tribunal was duty bound to ensure that in the first instance all the three appeals were heard together by consolidating them, and alternatively, decide the subsequent appeal independently of the earlier order dated 21.3.2006.

8. Before proceeding to discuss the merits of the issue it is necessary to deal with and dispose of the preliminary issue which was addressed on behalf of the petitioner at great length, viz., duty of the Tribunal to consolidate the appeals. The entire submission proceeds on a fallacious premise. A Bench of the Tribunal, which is primarily supposed to decide a lis brought before the Tribunal by the parties, cannot be expected to keep track of different appeals filed by different persons and come to the conclusion that certain appeal or appeals are required to be consolidated with some other appeal or appeals which are pending. The onus lies, in such circumstances, for all times to come, on the parties before the Tribunal to point out to the Tribunal with reasons in support of the submission as to why a particular appeal or appeals, is or are, required to be consolidated with some other appeal or appeals which are pending. To assign such a duty to the Tribunal is to almost ask for the impossible and this Court is not prepared to uphold such a contention. The petitioner was very well aware that the appeals had already been filed by Shri L.P.Parmar and Shri Sureshbhai Ramjibhai Patel. There is nothing on record, nor is any explanation coming forth during the course of hearing as to why the petitioner did not point out to the Tribunal the pendency of those appeals. It is necessary to note that the appeal filed by Shri L.P.Parmar was registered as Appeal No. 356 of 2002, appeal filed

by Shri Sureshbhai Ramjibhai Patel was registered as Appeal No. 647 of 2002, while the Appeal filed by the petitioner was registered as Appeal No. 535 of 2002. In other words, the Appeal filed by the petitioner and three others was appearing in seriatim in between two appeals filed by Shri L.P.Parmar and Shri Sureshbhai Ramjibhai Patel. If the petitioner was vigilant to the extent of challenging the order of Tribunal dated 21.3.2006 by way of Special Civil Application No. 10110 of 2006, it goes to indicate that the petitioner was well aware, not only about the pendency of the said appeals, but even the point of time when the appeals were heard and decided by the Tribunal. The petitioner consciously took a decision to take a chance and did not take any steps to consolidate his appeal when the other two appeals were heard. Thereafter the petitioner cannot be heard to make a grievance that the Tribunal has failed in consolidating the appeals. In absence of any duty on the Tribunal no such failure can be ascribed to the Tribunal, or for that matter any Court or Forum.

9. In the case of *Commissioner of Customs & Ors. Vs. Vasant Maganlal Chokshi & Ors. 2007(1) GCD 37(SC)* the Apex Court was called upon to deal with almost a similar contention. While upholding the judgment and order dated 24.6.2005 made by this Court in Special Civil Application No. 7342 of 2005 and order dated 7.7.2005 in Misc. Civil Application No. 1214 of 2005, wherein similar contention was raised before the High Court by Commissioner of Customs & Ors., the Apex Court upheld the finding of the High Court that it was not possible for the Tribunal on its own to link up two cross appeals unless the said fact was

brought to the notice of the Tribunal by the concerned party. It was also observed that since the petitioner had failed in its duty in pointing out the fact that the Department's appeal was pending when the Tribunal took the assessee's appeal for hearing, it was no longer open to the petitioner to turn round and to point a finger at the Tribunal in these circumstances.

10. There is one more aspect of the matter. The learned Counsel for the petitioner has referred to a Xerox copy of the writ carrying interim order made by this Court and stated that the copy has been obtained from the record of the Tribunal. May be. However, it is necessary to take note of the fact that the order under challenge was dated 21.3.2006 and paragraph No. 34[F] of Special Civil Application No. 10110 of 2006 reads as under, which was the ad interim relief granted by the Court on 9.5.2006 :

> *"[F] Pending the admission hearing and final hearing of this writ petition, Your Lordships may be pleased to stay the execution, operation and implementation of the order dated 21.3.2006 rendered by the Gujarat State Cooperative Tribunal in Appeal Nos. 356 and 647 of 2002, in so far as it fixes the liability upon the petitioner as well as be pleased to stay the communication dated 10.3.2006 issued by the Kheda District Central Cooperative Bank Ltd. on the basis of the order dated 11.8.2003 passed by the Registrar, Cooperative Societies, Gujarat State".*

Thus, the writ would have gone in the record of Appeal Nos. 356/02 and 647/02, because those are the appeal numbers mentioned in paragraph No.34(F) of petition in Special Civil Application No.10110 of 2006. There is nothing on record to show when the writ was placed on record of the Tribunal. The Tribunal cannot be expected to link the same with the pending appeal of the petitioner unless and until the petitioner invites attention of the Tribunal to the said order which was an order of exparte ad interim relief especially in light of the fact that the Appeal No. 535 of 2002 is captioned in the name of Shri Vijaybhai Fulabhai Patel, who is the first appellant therein, and the petitioner is only one of the other three appellants. Hence, this preliminary contention cannot be the basis for holding that the impugned order of the Tribunal viz. dated 29.11.2006 suffers from any infirmity. Therefore, the preliminary contention made on behalf of the petitioner does not merit acceptance and is rejected.

11. The learned Counsel appearing on behalf of the respondent is justified in referring to the scope of jurisdiction available to this Court in a petition wherein a writ of certiorari is prayed for. The position in law is well settled. The High Court is not required to act as an Appellate Court so as to undertake reappreciation of the evidence on record. The limited scope of intervention that is available to the High Court is where the order of the subordinate Court/Forum is either without jurisdiction or in excess of jurisdiction, or the order suffers from vice of perversity. None of the impugned orders dated 21.3.2006 and 29.11.2006 can be said

to be suffering from either want of jurisdiction or excess of jurisdiction vested in the Tribunal, nor is it possible to state that either of the order suffers from vice of perversity. It is equally well settled that merely because the High Court is in a position to record a different finding i.e. different from the one recorded by the Tribunal, on the same set of facts, circumstances and evidence on record, that by itself is not sufficient to vest the High Court with jurisdiction to entertain the petition. Even mere error of law and/or error of fact per se is not sufficient to enable the High Court to exercise the writ jurisdiction. Such an error has to be an error of law which is manifest or apparent on the face of the record. The impugned orders do not suffer from any of such legal infirmities so as to enable this Court to intervene. However, as certain legal issues were raised during the course of hearing the same may be examined in the backdrop of facts on record, only for the purpose of satisfying the conscience of the Court.

12. Section 93 of the Act reads as under :

"93. Power of Registrar to assess damages against delinquent, promoters, etc.:-

1. *Where, in the course of or as a result of an audit under section 84, or an inquiry under section 86 or an inspection under section 87, or the winding up of a society, the Registrar is satisfied on the basis of the report made by the auditor or the person authorised to make inquiry under section 86, or the person authorised to inspect the books under section 87, or the Liquidator under section 110, that any person who has taken any part , in the organization or management of the society or any deceased , or past or present*

officer of the society has, within a period of five years prior to the date of such audit, inquiry, inspection or order for winding up, misapplied or retained, or become liable or accountable for, any money or property of the society, or has been guilty of misfeasance or breach of trust in relation to the society, the Registrar or a person authorised by him in that behalf may investigate the conduct of such person or persons and after framing charges against such person or persons, and after giving a reasonable opportunity to the person concerned and in the case of a deceased person to his representative who inherits his estate, to answer the charges, make an order requiring him to repay or restore the money or property or any part thereof, with interest at such rate as the Registrar or the person authorised under this section may determine, or to contribute such sum to the assets of the society by way of compensation in regard to the misapplication, retention, misfeasance or breach of trust, as he may determine.

2. *The Registrar or the person authorised under sub-section (1) in making any order under this section, may provide therein for the payment of the costs or any part thereof such investigation, as he thinks just, and he may direct that such costs of any part thereof shall be recovered from the person against whom the order has been issued.*
3. *This section shall apply, notwithstanding that the act is one for which the person concerned may be criminally responsible."*

The section provides that where in the course of or as a result of an audit under section 84, or an inquiry under section 86 or an inspection under section 87 of the Act or a winding up of a society under section 110 of the Act, on the basis of the report of the

Auditor, Inquiry Officer, Inspector, or Liquidator, if the Registrar is satisfied that any person who has taken any part in the management of a society, in past or present within a period of five years prior to the date of such audit, etc. and such person has :

(a) misapplied or retained, or

(b) become liable or accountable for,

any money or property of the society,

(c) has been guilty of misfeasance or breach of trust in relation to the society,

the Registrar or a person authorised by the Registrar may investigate the conduct of such person and after framing charges and giving reasonable opportunity to such person make an order requiring him to repay or restore the money or property or any part thereof, with interest at the rate determined by the Registrar or to contribute such sum to the assets of the society by way of compensation in regard to the misapplication or retention or misfeasance or breach of trust as may be determined. Sub-section (2) of Section 93 of the Act provides for imposing of costs of investigation as may be determined by the Registrar. Sub-section (3) of Section 93 of the Act makes it clear that the provision is applicable notwithstanding the fact that the act for which such person is held liable may be also criminally responsible. Therefore, on a plain reading it is apparent that various contingencies are provided by section 93(1) of the Act on happening of which the result is deprivation of the funds or the property of the society, or the act is to the detriment of the society, considering the position in which such person is vis-a-vis the society and its affairs, viz. in the management of the affairs of the society, and then to effect

recovery.

13. It may be, that on the facts of the present case, there may be no misapplication or retention of any money or property of the society. However, the action of the petitioner definitely can be termed to be an act of misfeasance. The concept of misfeasance is by now well settled by a catena of decisions.

13.1 In the case of *Official Liquidator, Supreme Bank Ltd., Vs. P.A. Tendolkar, AIR 1973 SC 1104* in paragraph No.40 the Apex Court has laid down that :

> *"**40.** It is certainly a question of fact, to be determined upon the evidence in each case, whether a Director, alleged to be liable for misfeasance, had acted reasonably as well as honestly and with due diligence, so that he could not be held liable for conniving at fraud and misappropriation which takes place. Director may be shown to be so placed and to have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the Company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him*

and compelled to make good the losses incurred by the Company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the Company."

13.2 In another decision in the case of *The Official Liquidator Vs. Raghava Desikachar and others, AIR 1974 SC 2069* the Supreme Court states as to on whom the burden of proving misfeasance rests in the following words :

"7. xxx xxx xxx It may be mentioned that misfeasance action against the Directors is a serious charge. It is a charge of misconduct or misappropriation or breach of trust. For this reason the application should contain a detailed narration of the specific acts of commission and omission on the part of each Director quantifying the loss to the Company arising out of such acts or omissions. The burden of proving misfeasance or non-feasance rests on the Official Liquidator."

13.3 This Court in the case of *Official Liquidator of Dhavalgiri Paper Mills Pvt. Ltd. Vs. Chinubhai Khilachand & Ors. (2002) 39 GLR 2738* has summarised the position of law in the following words :

"7. Therefore, to bring the charge of misfeasance against the ex-directors it is necessary that specific acts of commission or omission and/or negligence on the part of each Director are pointed out; the loss arising to the Company as a result of such specific act of commission or omission or negligence shall also have to be quantified as the order of recovery from such a director would be based on the said quantification. The liability under the provision though in the nature of tortious liability, it yet is quasi-criminal in nature and it is a particular Director who has caused loss to the Company by his act which would amount to misappropriation, breach of trust, misapplication or retention of monies/properties of the Company who would be called upon to make good such loss. Thus, the onus is on the person who alleges such acts of misfeasance. The onus has to be discharged by cogent, reliable and specific evidence which should prove that the alleged misconduct was willful and amounted to misfeasance with culpable negligence. The meaning of misfeasance is the improper performance of same act which a person may lawfully do. Thus seen, a director while carrying out an activity which he is otherwise empowered to carry out under the law, performs it in such a manner that the same is improper and such impropriety has to be willful so as to cause loss to the Company. In other words, the act of commission or omission or negligence should be

with the intent and knowledge to cause loss to the Company and at the same time resulting in personal gain. Not all acts which result in loss to the Company can be treated as acts of misfeasance, making a Director liable under Sec. 543 of the Act, because while carrying on business there is every likelihood that loss may be incurred in a transaction or number of transactions. It is only when such loss to the Company results in wrongful gain to the Director in question that it would fall within the scope of provisions of Sec. 543 of the Act."

14 The facts found by the Inquiry Officer and the Tribunal reveal that the Managing Committee passed resolution No.10 on 31.3.1998 whereby all the members/directors constituting the Managing Committee were to attend the Leadership Development Programme to be conducted by National Cooperative Union of India from 22.4.1998 to 24.4.1998. Admittedly NCUI had only extended invitation for the aforesaid period of three days and resolution No.10 of the Managing Committee permitted the total expenditure that may be incurred for a period of eight days considering the period required for travelling to and fro from Nadiad to Delhi. Quotation received from Patel Travels was for a sum of Rs.73,500/- for the said period of eight days which was inclusive of travelling expenses as well as expenses towards meals etc. The resolution nowhere provided that the study tour could be extended beyond the permitted period of eight days so as to travel to other places i.e. other than going upto New Delhi and

returning, nor did the resolution provide for sight seeing either enroute or beyond New Delhi. The Tribunal has found that a sum of Rs.73,500/- was paid to Patel Travels; seven committee members travelled, accompanied by their family members; books of account of the Union record payment of Rs.73,500/-; rojmel (cash book) of Patel Travels also reflects the contra entry and Patel Travels has passed a receipt for a sum of Rs.73,500/- only. The Executive Officer of the Union has placed on record details of various places like Hardwar, Ayodhya, Kathmandu, Banaras, Allahabad and Agra etc. which were visited by 23 persons in all. Amongst these 23 persons 4 persons are found to be the staff members who accompanied the Managing Committee members.

15. After recording the aforesaid facts the Tribunal has come to the conclusion that neither does the invitation letter of NCUI refer to any other place of visit, nor does the invitation refer to family members accompanying the authorised persons of the Union; viz., family members of the 7 committee members in the present case. It is in the aforesaid circumstances, the facts and evidence on record that the Tribunal has found that the tour for a total period of 16 days accompanied by family members violates the sanction which was granted vide resolution No.10, as the said resolution only permitted a trip for eight days for travelling from Nadiad to New Delhi and back, and that too only for the Managing Committee members. Therefore, both the Inquiry Officer and the Tribunal have concurrently found that the petitioner and other persons who participated in the trip had acted beyond the resolution of the Managing Committee. The contention, that the

petitioner and other members of the Committee who travelled have borne the expenses for the additional days and their family members, has not been accepted by the Inquiry Officer in absence of any evidence. The said contention does not find place in the Memorandum of Appeal before the Tribunal or even in the written submissions filed before the Tribunal. Therefore, on this count also it is not possible to state that the orders of the Tribunal suffer from any infirmity so as to call for any intervention by this Court. The Tribunal primarily was called upon to decide the validity and correctness of the order made by the Inquiry Officer and unless and until a specific contention is raised before the Tribunal, it is not possible to expect the Tribunal to undertake an inquiry into facts and evidence on record on its own, if it comes to the conclusion that the order of the Inquiry Officer against which Appeal is before the Tribunal is correct on facts and evidence on record.

16. Hence, it is not possible to state that the Inquiry Officer has not discharged the primary onus which rests on him. It is equally well settled that when a person raises an issue of fact as a defence the onus rests on the said person to make good the averment made by the said person. In the present case, it is the say of the petitioner that the petitioner and other committee members who had undertaken the trip had borne expenses for additional days and for additional persons. However, the record reveals that except for a bald averment there is no evidence in support of such statement. The Inquiry Officer or the Tribunal are not expected to undertake an exercise to call upon the petitioner to prove the case put forth by the petitioner. The burden is on the petitioner to establish his

case. Therefore, the contention regarding failure to discharge the onus is not acceptable.

17. Both the Inquiry Officer and the Tribunal have concurrently found that except for Rs.73,500/-, no other sum had been paid by the Union or the petitioner and other persons who undertook the trip and therefore they have worked out the liability per head after apportioning the amount amongst the total number of persons who travelled. The Inquiry Officer worked out the per head liability on the basis of total number of persons who travelled as being 25 and deducting therefrom the amount relatable to 10 Managing Committee members. However, the Tribunal has taken into consideration the fact that actually only 23 persons had travelled, out of which 4 were staff members and though the resolution had been passed by 10 committee members, in fact only 7 committee members had undertaken the trip. That is how the Tribunal has reworked the per head liability. In the aforesaid circumstances, it is not possible to state that the Tribunal has committed any error . Once the entire issue was at large before the Tribunal viz., whether any liability for misfeasance arose so as to entitle the Union to effect any recovery from the committee members who had undertaken the trip, as a natural corollary while determining and ascertaining as to who in fact had travelled, the Tribunal was required to determine the total expenses incurred, the total number of persons who had travelled and the liability per head to make payment to the Union, considering the requirement of provisions of Section 93 of the Act, viz., making recovery from the persons who are in the management of the affairs of the society. Therefore, the Tribunal has rightly excluded the staff members

while computing per head liability.

18. During the course of hearing, a contention was raised that the entire action by the Registrar was due to political considerations and thus malafide. It is not necessary to enter into the said aspect of the matter considering the facts which have come on record. The petitioner has not disputed that in fact 23 persons had travelled and the total period of travel was for 16 days. In other words the period of travel and the number of persons who travelled both are in excess of the sanctioned period and strength as per resolution No.10 dated 31.3.1998. On these facts there can be no question of political consideration while initiating the inquiry on the basis of the special audit report. There is one more indication available on record which belies this claim of political malafide. As already noticed hereinbefore, the inquiry was initiated in relation to three charges but after taking into consideration the explanation tendered on merits the Inquiry Officer has dropped charge No.1 and charge No.3. This gives an indication that the entire procedure followed by the authorities is fair, just and in accordance with the provisions of law. The Tribunal has rightly upheld the same.

19. There is one additional aspect of the matter. The concept of misfeasance as noted hereinbefore requires that a Director or a person in management while carrying out an activity which he is otherwise empowered to carry out under law, performs it in such a manner that the same is improper and such impropriety is wilful so as to cause loss to the company and at the same time resulting

in personal gain. As the facts reveal the total number of days of travel exceeded the resolved period and the committee members, who were part of the same committee when the resolution was passed on 31.3.1998, willingly with intent and knowledge permitted their family members to accompany them on the trip. In these circumstances, it is apparent that the expenses which would otherwise have been required to be borne by the committee members themselves personally have been debited in the books of the Union under the ostensible canopy of being permitted by resolution to undertake the trip for the purpose of Leadership Development Programme.

19.1 As laid down by the Apex Court, though in a slightly different context, the Court is not required to show misplaced sympathy to such defaulters considering the position that they occupy. In the case of *The State of Pnujab & Ors. Vs. Ram Singh Ex. Constable, JT 1992(4) SC 253 at page 257 :*

> *"7. xxx xxx xxx The contention that there must be plurality of acts of misconduct to award dismissal is fastidious. The word 'acts' would include singular 'act' as well. It is not the repetition of the acts complained of but its quality, insidious effect and gravity of situation that ensues from the offending 'act'. The colour of the gravest act must be gathered from the surrounding or attending circumstances. Take for instance the delinquent that put in 29 years of continuous length of service and*

had unblemished record; in 30th year he commits defalcation of public money or fabricates false records to conceal misappropriation. He only committed once. Does it mean that he should not be inflicted with the punishment of dismissal but be allowed to continue in service for that year to enable him to get his full pension. The answer is obviously no. Therefore, a single act of corruption is sufficient to award an order of dismissal under the rule as gravest act of misconduct".

Merely because a person claims that he has unblemished record for a long duration and only one instance of defalcation of public money cannot amount to gravest act of misconduct, has been negatived by the Apex Court.

19.2 In the case of *Janatha Bazar (South Kanara Central Cooperative Wholesale Stores Ltd.) and others Vs. Secretary, Sahakari Noukarara Sangha and others, (2007) 7 SCC 517,* while dealing with a case of a lowly paid employee the Apex Court observed :

"Once an act of misappropriation is proved, may be for a small or large amount, there is no question of showing uncalled-for sympathy and reinstating the employee in service. Law on this point is well settled. (Re: Municipal Committee, Bahadurgarh Vs. Krishnan Behari)".

19.3 In the case of *Karnataka State Road Transport Corporation*

Vs. B.S.Hullikatti, AIR 2001 SC 930 the Apex Court again observed:

> *"6. It is misplaced sympathy by the Labour Court in such cases when on checking it is found that the Bus Conductors have either not issued tickets to a large number of passengers, though they should have, or have issued tickets of a lower denomination knowing fully well the correct fare to be charged. It is the responsibility of the Bus Conductors to collect the correct fare from the passengers and deposit the same with the Company. They act in a fiduciary capacity and it would be a case of gross misconduct if knowingly the do not collect any fare or the correct amount of fare.*

20. If this be the position in law in relation to an employee simplicitor, the approach in case of misfeasance by a Director, i.e. a person in charge of the management of the affairs of the society, cannot be viewed with any misplaced sympathy or in light of so called unblemished record. Once the fact finding Tribunal has come to the conclusion that the petitioner has committed an act which amounts to misfeasance the petitioner is bound to repay the loss to the society and cannot be heard to plead otherwise on extraneous considerations like political malafides and so called standing of the petitioner in the society. Even the quantum of the amount cannot have any relevance for determining whether misfeasance has been committed or not.

21. In the aforesaid circumstances, facts and evidence on record and in light of the settled legal position it is not possible to accept that the impugned orders of the Tribunal dated 21.3.2006 and 29.11.2006 suffer from any legal infirmity so as to call for any intervention by this Court. The petitions are accordingly rejected. Notice discharged. Interim relief stands vacated in Special Civil Application No. 10110 of 2006. There shall be no order as to costs.

CIVIL APPLICATION No. 251 of 2007.

22. In light of the order made in main petition being Special Civil Application No. 25997 of 2006 the Civil Application having become infructuous is rejected as such.

23. **SPECIAL CIVIL APPLICATION No. 1039 of 2007.**

This petition challenges order dated 6.1.2007 made by District Registrar, Nadiad under Rule 32(1)(f) of the Gujarat Co-operative Societies Rules, 1965 (Rules) as a consequence of the orders which came to be made by the Tribunal on 21.3.2006 and 29.11.2006 holding the petitioner liable under Section 93 of the Gujarat Cooperative Societies Act, 1961. the petitioner liable under Section 93 of the Gujarat Cooperative Societies Act, 1961. It is an admitted position that this petition is consequential to two petitions filed by the petitioner viz. Special Civil Application No. 10110 of 2006 and Special Civil Application No. 25997 of 2006 which have been rejected today by a separate judgment of even date. Hence, the present petition does not merit acceptance.

24. However, on facts of the case, the present petition is even otherwise required to be rejected as the petitioner has not approached the Court with clean hands though the petitioner is seeking equity. The undisputed facts are that on 21.12.2006 the petitioner was issued a show cause notice under Rule 32 of the Rules calling upon the petitioner to tender his explanation on 2.1.2007. On the said date the petitioner sent a written communication to the District Registrar stating that as the petitioner was sick and would be discharged only after 14.1.2007 time may be granted to tender reply. The said communication dated 2.1.2007 was accompanied by a Medical Certificate titled "*Sick Certificate*" dated 2.1.2007 issued by one Dr.Samir J. Patel, Sanjay Hospital, Nadiad, wherein it is stated that the petitioner was suffering from Jaundice with Malaria and advised rest from 31.12.2006 to 14.1.2007. It is not necessary to set out the further facts and correspondence between the parties including various additional medical reports, etc. placed on record. However, suffice it to state that in subsequent communication also the petitioner has prayed for time upto 14.1.2007 as according to him he was bedridden and hospitalized till that point of time. The ground on which the petition is filed is that no adequate opportunity was granted for the purpose of replying to the show cause notice issued on 21.12.2006 in light of the illness of the petitioner.

25. However, unfortunately the record reveals otherwise. The petitioner has stated that he is bedridden and hospitalized and is under medical advice not to travel. The present petition which has

been filed on 10.1.2007 has been sworn by the petitioner on 10.1.2007 at Ahmedabad in presence of a Notary and this fact has been accepted by the learned Advocate for the petitioner.

26 A person who can travel upto Ahmedabad from Nadiad to file the petition could very well have tendered reply to the show-cause notice. Law is well settled. A person who does not avail of the opportunity granted cannot be heard to make grievance about lack of opportunity.

27. Therefore, not only the petitioner has produced false evidence before the Registrar but made it a ground before this Court while invoking equity jurisdiction of this Court. Such a petitioner cannot be permitted to plead any equity. The petition is required to be rejected on this ground also. The petitioner shall pay a sum of Rs.5,000/- to The High Court Legal Services Committee within a period of one week from today for presenting a petition on grounds based on factually incorrect averments.

28 The petition is summarily rejected.

Registry to place copy of this order in all connected matters.

Sd/-
(D.A. Mehta, J)

m.m.bhatt